

In re Patent Application of:  
**PURVIS ET AL.**  
Serial No. **09/703,277**  
Filed: **October 31, 2000**

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22. (Amended) The temporary guard rail system of Claim 21, wherein said roof anchoring means is matched to the configuration of said corrugated sheet metal.

b1  
cont

Please add the following new claims:

23. A method of installing a temporary guard rail system, the method comprising:

b2

attaching a plurality of upright stanchions in preselected locations about the perimeter of an area to be protected;

rotatably mounting at least one side rail to at least one of the plurality of upright stanchions; and

anchoring each one of the plurality of stanchions to a support surface of the area to be protected.

24. The method as defined in Claim 23, further comprising installing an adapter bracket on a top portion of each of the plurality of stanchions to vertically adjust the at least one side rail.

25. The method as defined in Claim 24, further comprising vertically adjusting the height of the at least one side rail.

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**REMARKS**

Applicants respectfully thank the Examiner for her thorough examination of the subject patent application. Applicants further thank the Examiner for the indication that Claims 1-11 are allowable and the indication that Claims 12-22

In re Patent Application of:

**PURVIS ET AL.**

Serial No. **09/703,277**

Filed: **October 31, 2000**

---

would be allowable if amended to overcome rejections based on 35 U.S.C. §112, 35 U.S.C. §251, and the double patenting rejections (Claims 13-22 only).

Applicants have added new Claims 23-25. Method claims were included in the original patent application. In an Office Action dated March 26, 1996 for related U.S. Patent Application Serial No. 08/755,596 (for which this parent patent was a continuation-in-part) the Examiner restricted the method claims. The claims were subsequently divided into U.S. Patent Application Serial No. 08/963,481 which was a divisional application of U.S. Patent Application Serial No. 08/755,596, and re-filed. U.S. Patent Application Serial No. 08/963,481 was inadvertently abandoned. Method Claims 23-25 have been added in this amendment for consideration by the Examiner.

In response to paragraph 1 of the Office Action, and in accordance with the continuing obligation under 37 C.F.R. §1.56, Applicants submit that there is no currently pending litigation where U.S. Patent No. 5,842,685 is directly involved. In response to paragraph 2 of the Office Action, as set forth in the original application papers, as well as herein, Applicants again hereby make an offer to surrender the original patent in accordance with 37 C.F.R. §1.178.

In response to paragraph 3 of the Office Action, as set forth in the original reissue declaration by the assignee, the Assignee asserted that "I verily believe the original patent to be wholly or partly inoperative or invalid by reason of the patentee claiming more or less than he had the right to Claim in the patent." More particularly, the Assignee further asserted "Applicant's previous attorney failed to appreciate

In re Patent Application of:

**PURVIS ET AL.**

Serial No. **09/703,277**

Filed: **October 31, 2000**

---

the contribution and scope of Applicant's invention and failed to Claim the scope of what Applicant was entitled to Claim. Applicant's previous attorney allowed Claims to issue which were too narrow. Applicant submits that such errors arose without any deceptive intent." Applicants, however, re-submit herewith the original reissue declaration (See Exhibit A) by Assignee for the Examiner's review. The assignment of the patent is recorded at Reel 7665, Frame 0316. In response to paragraph 4 of the Office Action, Applicants acknowledge that the drawings have not yet been reviewed by a PTO draftsman.

In response to paragraph 5 of the Office Action, Applicants have amended Claims 12-16 and 18 to overcome the 35 U.S.C. §112 rejections set forth by the Examiner. With regards to Examiner's rejection of Claim 14, however, Applicants respectfully submit that "said at least one threaded stud" does not lack antecedent basis as it is defined as "at least one threaded stud" in line 6 of Claim 14.

In response to paragraphs 6-8 of the Office Action, Applicants submit herewith a terminal disclaimer in compliance with 37 C.F.R. §1.321(c). Also attached herewith is a petition under 37 C.F.R. §1.47 For Joint Inventor Refusing to Join in the Application. To supplement the petition under 37 C.F.R. §1.47 is a statement made by Mr. Harrison G. Purvis, one of the joint inventors and the sole assignee of the above-referenced patent applications. Mr. Tony R. Matthews refuses to join in the application. Mr. Matthews is currently being detained at a correctional facility in North Carolina. Applicants request that Mr. Matthews be included as a joint inventor on the above-referenced patent application.

In re Patent Application of:

**PURVIS ET AL.**

Serial No. **09/703,277**

Filed: **October 31, 2000**

---

- I. The rejection based upon the doctrine of Recapture under 35 U.S.C. §251 is improper because the claims define over the references cited by the Examiner in the final Office Action dated August 28, 1997.**

In paragraph 9 of the Office Action, the Examiner notes that Claim 12-22 are rejected because the broadening aspect in the reissue relates to subject matter that Applicants previously surrendered during the prosecution of the application. Specifically, the Examiner notes that Claims 12-22 do not include the following claim limitations:

"said angulation means comprising a generally L-shaped swivel bracket disposed on said first threaded stud at said top end of said stanchion, said L-shaped bracket including a long leg portion and a short leg portion being fixedly attached in perpendicular relation thereto, said bracket further including swiveling means being adapted for pivoting movement in a plane parallel to the plane defining said long leg portion, said swiveling means including a second threaded stud disposed in perpendicular relation to said axis of said stanchion enabling said upper side rails to be mounted thereon and pivoted in a vertical plane at varying angles for installation of said temporary guardrail system on inclines such as stairs."

Upon review of the file history, it is the Applicants understanding that during the prosecution of the application, the above-referenced language was added to the claims. More specifically, a final Office Action was issued on August 28, 1997. In the final Office Action, the Examiner issued a provisional rejection of the claims under 35 U.S.C. §102(e)/103(a) based upon a combination of co-pending U.S. Patent Application Serial No. 08/755,596 which issued as U.S. Patent No. 5,683,074, Lamb, Bourn, and Stewart. The Examiner further noted that the provisional rejection might be overcome

In re Patent Application of:  
**PURVIS ET AL.**  
Serial No. **09/703,277**  
Filed: **October 31, 2000**

---

by a showing under 37 C.F.R. 1.132 that any invention disclosed but not claimed in the co-pending application was derived from the inventor of this application and is thus not the invention "by another".

On September 30, 1997, Applicants' former attorney conducted a telephonic interview with the Examiner during which the Examiner informed Applicants' attorney that including the subject matter of the dependant claims in the independent claim would put the case in condition for allowance. Applicants submit that Applicants' former attorney narrowed the claims in error by including the language of the dependent claims. Applicants further submit that the rejection based on 35 U.S.C. §102(e)/103(a) would have been overcome by the submission of a declaration under 35 U.S.C. §132. Applicants have submitted a declaration under 35 U.S.C. §132 herewith for consideration by the Examiner. Applicants still further submit, that regardless of whether the rejection based on 35 U.S.C. §102(e)/103(a) would have been removed by the Examiner with a submission of a declaration under 35 U.S.C. §132, Claims 12-22 of the current re-issue application define over the references cited by the Examiner in the final Office Action, and more specifically the co-pending U.S. Patent Application Serial No. 08/755,596, which issues as U.S. Patent No. 5,683,074, Stewart '242, Bourn '257, and Lamb '696.

Applicants further note that even if the above-referenced claim language was added during a telephonic interview, it is improper for the Examiner to now reject Claims 12-22 based on the recapture doctrine of 35 U.S.C. §251. In the Office Action, the Examiner notes that "[a] broadening aspect is present in the reissue which was not present in the

In re Patent Application of:  
**PURVIS ET AL.**  
Serial No. **09/703,277**  
Filed: **October 31, 2000**

---

application for patent." Applicants respectfully submit that this is the entire purpose of the broadened reissue application.

As noted in the case of *In re Weiler*, 229 U.S.P.Q. 673, 682 (Fed. Cir. 1986), "the whole purpose of the [reissue] statute, so far as claims are concerned, is to permit limitations to be added to claims that are too broad or to be taken from claims that are too narrow." Similarly, in the present invention, Applicants seek to eliminate a limitation from a claim that is too narrow.

In the case of *In re Clement*, 45 USPQ2d 1161, 1171 (Fed. Cir. 1997), the court noted that "[t]he first step in applying the recapture rule is to determine whether and in what aspect the reissue claims are broader than the patent claims." In the present case, the Examiner has noted that the reissue claim is broader than the patent claim in that it does not include the above-referenced language. *Clement* goes on to note that "[t]he second step is to determine whether the broader aspects of the reissue claims relate to surrendered subject matter. To determine whether an Applicant surrendered particular subject matter, we look to the prosecution history for arguments and changes to the claims made in an effort to overcome a prior art rejection." *Id.* at 1172. In the present case, however, the Applicants former attorney simply included limitations without even challenging the references or rejections set forth by the Examiner. Applicants submit that this was done in error, as described in more detail below. "Deliberately canceling or amending a claim in an effort to overcome a reference strongly suggests that the Applicant admits that the scope of the claim before the cancellation or

In re Patent Application of:

**PURVIS ET AL.**

Serial No. **09/703,277**

Filed: **October 31, 2000**

---

amendment is unpatentable, but it is not dispositive because other evidence in the prosecution history may indicate the contrary." *Id.* at 1173. Applicants respectfully submit that the fact that the claims were amended during the prosecution of the patent is not dispositive that the claims are surrendered.

In the final Office Action, the Examiner rejected the claims based on the co-pending application in view of Lamb, Bourn, and Stewart, as described in detail below. It was suggested by the Examiner in the final Office Action dated August 28, 1997, that a declaration under 37 C.F.R. 1.132 be submitted to remove the co-pending patent application, which issued as U.S. Patent No. 5,683,074, as prior art and overcome the 102(e)/103(a) rejection. That declaration is attached herewith.

**II. Claims 12-22 are nonobvious and define over Lamb, Bourn, and Stewart.**

Applicants submit that the recapture doctrine is not applicable in the present case because the above-referenced language is not necessary in the claims to overcome the 35 U.S.C. §103(a) rejections raised by the Examiner in the final Office Action dated August 28, 1997. The essential requirement for rejecting a claim under 35 U.S.C. 103(a) by combining two or more references is that there be a basis for combining them. To establish a *prima facie* case of obviousness, however, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the

In re Patent Application of:

**PURVIS ET AL.**

Serial No. **09/703,277**

Filed: **October 31, 2000**

---

references or to combine reference teachings. Secondly, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. Without the three above mentioned requirements, there is no prima facie case for rejecting the invention as obvious in view of the reference. Applicants respectfully submit that these criteria were not met by the Examiner in the final Office Action, and, therefore, Claims 12-22 cannot now be properly rejected under 35 U.S.C. §103(a).

**A. Lamb, Bourn, and Stewart fail to recognize the problems addressed by the presently claimed invention.**

Applicants submit that Lamb, Bourn, and Stewart cannot properly be used to reject Claims 12-22 of the present invention under 35 U.S.C. §103(a) because the applied patents fail to even recognize the problems or the source of the problems addressed by the presently claimed invention.

The presently claimed invention advantageously provides a temporary guard rail that can be readily installed on a support surface adjacent an open area. The present invention advantageously includes means for rotatably connecting side rails to stanchions enabling the side rails to be rotated about the stanchion. This advantageously eliminates the need to custom design side rails and stanchions in order to ensure proper positioning around varying perimeters. The present invention further includes an anchor bracket that can be readily connected to a support surface where the temporary rail is to be positioned.



In re Patent Application of:

**PURVIS ET AL.**

Serial No. **09/703,277**

Filed: **October 31, 2000**

---

Lamb '696, however, does not even describe a temporary rail. The device described in Lamb '696 is a scaffold having a rail for use as a support surface adjacent a side wall of a structure so that persons can walk thereon. The scaffold described in Lamb '696 cannot be readily installed onto a support surface of a structure, but rather acts as a support surface positioned adjacent a structure. For example, the scaffold described in Lamb '696 requires the construction of a brace portion positioned to connect to a sidewall of a structure. A floor portion must then be positioned to overlie the brace portion. A rail and rail brace are then attached to the lower brace and floor portions of the scaffold. A toe board is then connected between rail portions. This process is very lengthy, time consuming, and labor intensive. Applicants submit that the scaffold described in Lamb '696 teaches away from the claims of the present invention as it represents the very problem addressed and solved by the presently claimed invention.

The iron fence described in Stewart '242 also teaches away from the present invention in that it is a permanent structure. Stewart '242 describes a permanent iron fence that includes a plurality of iron posts and a plurality of rails positioned to extend therebetween. The iron posts are anchored to concrete using a flat plate and a brace to further support the iron posts. Applicants therefore submit that the iron fence described in Stewart '242 is a permanent fence and does not recognize the problems associated with readily installing a temporary fence, as addressed in the presently claimed invention.

In re Patent Application of:

**PURVIS ET AL.**

Serial No. 09/703,277

Filed: October 31, 2000

---

The purpose of the guard rail described in Bourn '257 is to allow a guard rail to be connected to floors having varying lengths. This is possible using an adjustable L- shaped bracket having a floor contacting plate. The installation of the guard rails described in Bourn '257, however, can be time consuming, expensive, and labor intensive. For example, the depth of the floor upon which the guard rail is to be attached must be measured at each individual point of attachment. The L-shaped bracket must then be adjusted to substantially match the measured portion of the floor. The guard rail can then be positioned on the floor, but the L-shaped bracket must be adjusted so as to secure the guard rail to the floor. As noted above, this process is time consuming and labor intensive. Further, the guard rail described in Bourn '257 is not as secure as a guard rail that is actually anchored into portions of a floor.

Applicants submit that none of the references recognize the problems of providing a temporary guard rail that can be readily and securely connected to a support surface adjacent an open area. Applicants therefore submit that since neither Lamb, Stewart, nor Bourn recognize the problems or the source of the problems addressed and solved by the claimed invention, there is clearly no suggestion for making a combination of these references that would somehow make Claims 12-22 obvious under 35 U.S.C. §103(a). In the case of *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261 U.S. 45 (1923), the United States Supreme Court distinguished an improvement on an old machine as being patentable because it served a different purpose to be accomplished. "It was the discovery of the source not before known and the application of the remedy for

In re Patent Application of:

**PURVIS ET AL.**

Serial No. **09/703,277**

Filed: **October 31, 2000**

---

which Eibel was entitled to be rewarded in his patent." Id. at 68. In the case of *In re Kotzab*, 217 F.3d 1365, 55 U.S.P.Q.2d 1313, (Fed. Cir. 2000), the Federal Circuit noted that the motivation to combine references comes from the nature of the problem to be solved. Therefore, as noted in 1923 by the United States Supreme Court and still recently recognized by the Federal Circuit, problem recognition is part of the invention. Clearly, the above references do not recognize the problems or the source of the problems addressed by the present invention and for this reason alone, Applicants respectfully submit that Claims 12-22 are non-obvious and define over Lamb, Stewart, and Bourn.

**B. There is no motivation or suggestion to modify or combine Lamb, Stewart, and Bourn.**

Since neither Lamb, Stewart, nor Bourn recognize the problems addressed by the presently claimed invention, Applicants respectfully submit that there exists no motivation or suggestion to modify or combine the references in an attempt to arrive at the presently claimed invention. In *Kotzab*, the court noted that "to establish obviousness based on a combination of the elements disclosed in the prior art, there must be some motivation, suggestion or teaching of the desirability of making the specific combination that was made by the Applicant. The motivation, suggestion or teaching may come explicitly from statements in the prior art, the knowledge of one of ordinary skill in the art, or, in some cases, the nature of the problem to be solved." Id. at 1316. The combination of a temporary guard rail having a portion that can be adapted to fit on various sized floors in Bourn, a

In re Patent Application of:

**PURVIS ET AL.**

Serial No. **09/703,277**

Filed: **October 31, 2000**

---

permanent iron fence in Stewart, and a scaffold as described in Lamb cannot be properly made to solve the problems only recognized and addressed by Applicants in the presently claimed invention. Applicants further submit that there is no motivation for the inventor to combine references that represent the very problem addressed and solved in the presently claimed invention.

Lamb describes a scaffolding having a lower brace member, Stewart describes a permanent iron fence, and Bourn describes an adjustable guard rail adapted to be positioned on floors of varying thickness. Clearly, there is no motivation to combine a scaffold or a guard rail having an adjustable bottom portion, both of which represent the very problem addressed and solved in the present invention, with a permanent iron fence in an attempt to arrive at a temporary guard rail that can be readily connected to a support surface adjacent an open area.

Applicants respectfully submit that the Examiner has randomly chosen references in hopes that a combination would solve the problems recognized and addressed by the presently claimed invention. One skilled in the art of temporary guard rails would have no motivation nor suggestion to combine these references, especially to solve the problems only recognized and addressed by the presently claimed invention.

Applicants respectfully submit that the Examiner is using improper hindsight to piecemeal the above-mentioned references in hopes that a combination of the references may provide a prima facie case of obviousness against the presently claimed invention. The court in *Kotzab* noted "[a] critical step in analyzing the patentability of claims pursuant to section

In re Patent Application of:  
**PURVIS ET AL.**  
Serial No. **09/703,277**  
Filed: **October 31, 2000**

---

103(a) is casting the mind back to the time of invention, to consider the thinking of one of ordinary skill in the art, guided only by the prior art references and the then-accepted wisdom in the field. Close adherence to this methodology is especially important in cases where the very ease with which the invention can be understood may prompt one 'to fall victim to the insidious effect of a hindsight syndrome wherein that which only the invention was taught is used against its teacher.'" *Kotzab* at 1316. In *Micro Chem., Inc. v. Great Plains Chem. Co.*, 103 F.3d 1538, 41 USPQ2d 1238 (Fed. Cir. 1997), the Federal Circuit held "[a] determination of obviousness must involve more than indiscriminately combining prior art; a motivation or suggestion must exist." Applicants respectfully submit none of the cited references have identified the problems or source of the problems addressed in the present invention. Why would one skilled in the art of temporary guard rails, absent the disclosure of the Applicants, combine a scaffold or a guard rail having an adjustable bottom portion, both of which represent the very problem addressed and solved in the present invention, with a permanent iron fence? In fact, Applicants submit that one skilled in the art of temporary guard rails would not look in the field of permanent iron fences at all.

Applicants respectfully submit that since none of the cited references recognize the problems addressed and solved by the presently claimed invention, there exists no motivation to combine references. Furthermore, Applicants respectfully submit that the Examiner has not set forth any evidence of a motivation to combine the reference. "Whether the Board relies on an express or an implicit showing, it must provide

In re Patent Application of:

**PURVIS ET AL.**

Serial No. **09/703,277**

Filed: **October 31, 2000**

---

particular findings related thereto. Broad conclusory statements standing alone are not evidence." *Kotzab* at 1317. Clearly, no such motivation or suggestion exists with the cited references when properly taken for what they teach as a whole. Further, there has been no evidence submitted that motivation or suggestion exists to combine the cited patents. For this reason, Applicants respectfully submit that Claims 12-22 are non-obvious and define of over Lamb, Stewart, and Bourn.

**C. Even if a combination of Lamb, Stewart, and Bourn could possibly be made, the purposes of the above-mentioned references would be destroyed.**

Applicants respectfully submit that neither Lamb, Stewart, nor Bourn solve or even recognize the problems addressed in the presently claimed invention. Any combination of Lamb, Stewart, and Bourn would not only fail to solve the problems addressed in the presently claimed invention, but would also make each of the references fail. Any combination of Lamb, Stewart, and Bourn clearly does not provide a reasonable expectation of success. For example, the lower brace portions of the scaffold in Lamb would interfere with the adjustable clamp of the guard rail in Bourn. Likewise, the adjustable clamp in Bourn could not possibly be used to permanently connect the iron fence in Lamb to a floor surface.

The court in the case of *In re Keller* noted that "the test [for obviousness] is what the combined teachings of the references would have suggested to those of ordinary skill in the art." *Keller* at 881. Applicants respectfully submit that the references of Lamb, Stewart, and Bourn still do not teach or suggest a temporary guard rail that can be readily installed on a floor surface. Applicants therefore submit

In re Patent Application of:

**PURVIS ET AL.**

Serial No. **09/703,277**

Filed: **October 31, 2000**

---

that the Examiner has not met the proper "obviousness test" according to the Federal Circuit in *Keller*.

Applicants submit that any combination of the cited references would not only fail to solve the problems that are addressed and recognized by the presently claimed invention, but would also cause the purposes of each reference to fail. Any combination of these references cannot provide a reasonable expectation of success. For this reason as well Applicants respectfully submit that the Examiner has failed to put forth a prima facie case of obviousness to reject Claims 12-22 of the present invention under 35 U.S.C. 103(a).

#### ***Conclusion***

In view of the amendments to the claims and the arguments provided herein, it is submitted that all the claims are patentable. Accordingly, a Notice of Allowance is requested in due course. Should any minor informalities need to be addressed, the Examiner is encouraged to contact the undersigned at the telephone number listed below.

Respectfully submitted,



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In re Patent Application of:

**PURVIS ET AL.**

Serial No. **09/703,277**

Filed: **October 31, 2000**

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**VERSION WITH MARKINGS TO SHOW CHANGES MADE**

**In the Claims:**

12. (Amended) A temporary guardrail system for removable attachment to a building under construction, the system comprising:

a plurality of upright stanchions;

an anchor bracket connected to a bottom end of each respective one of the plurality of stanchions;

a plurality of vertically spaced-apart side rails connected to each of the plurality of stanchions;

means for rotatably connecting said side rails to said stanchions enabling each respective side rail to be rotated about a longitudinal axis of each respective stanchion in a horizontal plane and each respective side rail to be pivoted at varying angles in a vertical plane, said connecting means including a first threaded stud outwardly projecting from a top end of said stanchions in substantially axial alignment therewith enabling each of said [upper] side rails to be rotatably mounted thereon at various angles, said [upper] side rails being pivoted in a vertical plane at varying angles [by use of angulation means];

means for telescopically adjusting the length of each respective side rail enabling said temporary guardrail system to be adapted to dimensional features of different buildings under construction; and

means for selectively extending the vertical height of said guardrail system for employees performing specialized tasks requiring ladders and stilts adjacent thereto.

13. (Amended) The temporary guardrail system of Claim 12, [wherein said] further comprising swiveling means



In re Patent Application of:

**PURVIS ET AL.**

Serial No. **09/703,277**

Filed: **October 31, 2000**

---

[includes] having a pair of [said] studs arranged in parallel[,] and spaced-apart relation [thereon], said studs being disposed in perpendicular relation to said axis of said stanchion enabling a pair of adjacent [upper] side rails to be mounted thereon and pivoted in a vertical plane at varying angles for installation of said temporary guardrail system on inclines [such as stairs].

14. (Amended) The temporary guardrail system of Claim 12, wherein said connecting means for said [lower] side rails comprises at least one rail support collar [cooperating with an angulation means] attached to each of said side rails, said at least one rail support collar being disposed about said stanchion and having at least one threaded stud outwardly extending therefrom and being perpendicular to a center axis of said collar enabling said angulation means of said side rails to be fixedly mounted on said at least one threaded stud.

15. (Amended) The temporary guardrail system of Claim 14, further comprising angulation means positioned to cooperate with said side rails, wherein said angulation means [of said side rails] comprises a mid-rail, swivel bracket disposed on said [on] at least one threaded stud extending from said rail support collar, said mid-rail, swivel bracket including an elongated body member and further including swiveling means being adapted for pivoting movement in a plane parallel to the plane defining said elongated body member, said swiveling means of said mid-rail, swivel bracket including a threaded stud mounted in perpendicular relation to said axis of said stanchion enabling said [lower] side rails to be mounted thereon and pivoted in a vertical plane at

In re Patent Application of:

**PURVIS ET AL.**

Serial No. **09/703,277**

Filed: **October 31, 2000**

---

varying angles for installation of said temporary guardrail system on inclines [such as flights of stairs].

16. (Amended) The temporary guardrail system of Claim 15<sub>1</sub> wherein said swiveling means of said mid-rail, swivel bracket includes a pair of threaded studs arranged in generally parallel, spaced-apart relation enabling a pair of said [lower] side rails to be mounted thereon and pivoted in a vertical plane at varying angles for installation of said temporary guardrail system on inclines such as flights of stairs.

17. (Amended) The temporary guard rail system of Claim 14<sub>1</sub> wherein a plurality of rail support collars are disposed about said stanchions at a pre-determined vertical location in an operative relationship between at least two rail stops.

18. (Amended) The temporary guardrail system of Claim 12<sub>1</sub> wherein said extending means includes a plurality of extension posts being adapted for sliding engagement about the outside diameter of said stanchions at [the] upper ends thereof, said extension posts including connecting means so as to permit attachment of a plurality of vertically spaced side rails thereon enabling the vertical height of said temporary guard rail system to be selectively extended [to provide increased safety to employees performing specialized tasks adjacent thereto].

19. (Amended) The temporary guard rail system of Claim 12<sub>1</sub> wherein each respective stanchion is fixedly attached to a ground anchoring means for installation directly onto a ground surface [adjacent an excavation site].

In re Patent Application of:

**PURVIS ET AL.**

Serial No. **09/703,277**

Filed: **October 31, 2000**

---

20. (Amended) The temporary guard rail system of Claim 19, wherein said ground anchoring means is fabricated from a heavy gauge, corrugated sheet metal material that is adapted to receive a plurality of anchor pins therethrough for securing said ground anchoring means directly to the surface of the ground.

21. (Amended) The temporary guard rail system of Claim 12, wherein each respective stanchion is adapted for installation on a roof anchoring means fabricated from corrugated sheet metal.

22. (Amended) The temporary guard rail system of Claim 21, wherein said roof anchoring means is matched to the configuration of said corrugated sheet metal [used in the construction of a roof].

In re Patent Application of:

**PURVIS ET AL.**

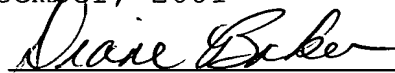
Serial No. **09/703,277**

Filed: **October 31, 2000**

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**CERTIFICATE OF MAILING**

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: ASSISTANT COMMISSIONER FOR PATENTS, U.S. PATENT AND TRADEMARK OFFICE, WASHINGTON, D.C. 20231, on this 10<sup>th</sup> day of September, 2001



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DIANE BAKER